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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 333

MICHAEL WILSON, GALE SONDERGARD, HOWARD DA SILVA, JOHN HOWLAND CHAMBERLIN, FRED GRAF, ALVIN HAMMER, DONALD A. GORDON, ROBERT LEES, ROBERT L. RICHARDS, WALDO SALT, PHILIP STEVENSON, LOUISE ROUSSEAU, ALFRED LEWIS LEVITT, PAUL JARRICO, ABRAHAM LINCOLN POLONSKY, WILMA SHORE, HERTA UERKVITZ, PAUL PERLIN, GUY ENDORE, EDWARD F. HUEBSCH, FREDERIC L. RINALDO, LOUIS SOLOMON and ANNE REVERE,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation; PARAMOUNT PICTURES, INC., a corporation; COLUMBIA PICTURES CORPORATION, a corporation; R.K.O. RADIO PICTURES, INC., a corporation; WARNER BROTHERS PICTURES, INC., a corporation; REPUBLIC PRODUCTIONS, INC., a corporation; SAMUEL GOLDWYN STUDIOS, INC., a corporation; HAL E. ROACH STUDIO, INC., a corporation; TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation; UNIVERSAL PICTURES COMPANY, INC., a corporation; WARNER BROS. PICTURES DISTRIBUTION CORP., a corporation; WALD-KRASNA PRODUCTIONS, INC., a corporation; UNITED STATES PICTURES, INC., a corporation; STANLEY KRAMER COMPANY, a corporation; STANLEY KRAMER PRODUCTIONS, INC., a corporation; SOL LESSER PRODUCTIONS, INC., a corporation; CITADEL PICTURES, a corporation; MOTION PICTURE ASSOCIATION OF AMERICA, INC., a corporation; SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS, a corporation; L. B. MAYER, HOWARD HUGHES, E. B. MANNIX, Y. FRANK FREEMAN, HENRY GINSBERG, HARRY COHN, BEN B. KAHANE, DORE SCHARY, HARRY M. WARNER, JACK WARNER, HERBERT J. YATES, SAMUEL GOLDWYN, HAL E. ROACH, WALTER WANGER, JOSEPH M. SCHENCK, STANLEY E. KRAMER, SOL LESSER, LEO SPITZ, DARRYL ZANUCK, JAMES GRANGER, JOHN S. WOOD, FRANCIS E. WALTER, MORGAN M. MOULDER, CLYDE DOYLE, JAMES B. FRAZIER, HAROLD E. VELDE, BARNARD W. KEARNEY, DONALD L. JACKSON, CHARLES E. POTTER, LOUIS J. RUSSELL, WILLIAM WHEELER, 1 DOE CO., a corporation; etc.,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

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15 University of Detroit Law Journal (1952), p. 178, Monopolies, the Motion Picture Industry 25

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Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

Petitioners pray that a writ of certiorari issue to review the judgments of the District Court of Appeal for the

State of California, Second Appellate District, Division Three, affirming judgments rendered by a judge of the Superior Court of Los Angeles County sustaining demurrers filed by respondents and dismissing petitioners' complaint in the above entitled cause, without leave to amend.

Opinions Below.

The opinion of the District Court of Appeal is reported at 142 A. C. A. 191, 298 P. 2d 152 and is set forth in Appendix A to this petition. The opinion of the Superior Court is not reported and is set forth in Appendix B to this petition. No written opinion was rendered by the Supreme Court of the State of California denying the petition for hearing, except that Mr. Justice Carter was of the opinion that the petition should be granted [R. 275].[1]

Jurisdiction.

The judgments of the District Court of Appeal were made and entered on June 11, 1956 [App. A; R. 247]. A timely petition for rehearing was filed in the District Court of Appeal and denied on July 11, 1956 [R. 199]. A timely petition for hearing by the Supreme Court of the State of California was filed and denied on August 8, 1956 [App. C; R. 275], Mr. Justice Carter being of the opinion that the petition should be granted. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

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[1]The reference "R" is to the pages of the certified record filed herein with this petition.

Questions Presented.

The questions presented herein arise out of the sustaining without leave to amend of a demurrer to a complaint. The complaint alleges that a combination of respondent motion picture companies, exercising a monopoly of employment opportunities in that industry, together with certain members and an investigator of the House Committee on Un-American Activities, by concerted agreement and conduct have excluded petitioners, who had long and successful professional careers in the motion picture industry, from all employment opportunities in that industry. The cause for such exclusion is that petitioners have either invoked the privilege against self-incrimination before the said House Committee or when named as Communists before that committee have failed voluntarily to appear and testify without invocation of their constitutional privileges. The Court below based its decision on the absence of an allegation in the complaint that petitioners had specific contracts of employment or the expectation of such specific contracts, holding that any individual who asserts his Fifth Amendment privilege may lawfully be excluded from all opportunity to pursue a calling if he does not have a specific contract of employment or the expectation of such a specific contract in the industry from which he is excluded. The questions presented under the aforesaid circumstances are:

1. Whether this Court has jurisdiction to review the judgments of the state court dismissing petitioners' complaint on respondents' demurrers.

2. Whether the judgments of the state court dismissing petitioners' complaint on respondents' demurrers as aforesaid was contrary to law and the supremacy clause of Article VI of the Constitution, deprived petitioners of

their liberty without due process of law and denied petitioners the equal protection of the laws in violation of the equal protection and due process provisions of the Fourteenth Amendment.

Constitutional Provisions and Statutes Involved.

The pertinent text of the Constitutional provisions and statutes involved are set forth in Appendix D to this petition.

Statement of the Case.

The complaint herein alleging the following facts was dismissed upon demurrers without leave to amend.

(a) Petitioners are by profession motion picture actors, actresses, writers, story editors, research workers and grips, respectively, having had from five to twenty-five years' experience in their professions and having acquired reputations for excellence of work in the motion picture industry and won high esteem as such professional persons in the said industry, all of which was known to respondents [R. 66, 75, 77-78, 80-82, 84-85, 87-89, 91-92, 94-96, 98-99, 101-102, 104-105].

(b) The respondent motion picture producers and distributors [R. 66-71] between them control all motion picture production and distribution in the United States and all motion picture employment opportunities in the United States for actors, writers, directors, producers and other employees in the said industry [R. 71].

(c) With respect to the matters alleged in the complaint, the three remaining respondents acted both in their official capacity with relation to the House Committee on Un-American Activities and individually in non-official capacities [R. 72].

(d) On and prior to March, 1951, and continuously thereafter, respondents and each of them agreed with each other as follows:

1. To refuse employment to and exclude from employment in the said industry all employees and persons seeking employment who were subpoenaed as witnesses before the said House Committee and who, relying on their rights and privileges under the Constitution, including the privilege against self-incrimination under the Fifth Amendment, refused to answer questions concerning their political affiliations, associations and beliefs.

2. To refuse employment to and exclude from employment all persons and employees who were named before said Committee as Communists and who failed to appear voluntarily before said House Committee to answer all inquiries without assertion of constitutional privileges.

3. To refuse employment to and exclude from employment all persons and employees who were subpoenaed to appear as witnesses before said Committee and who failed for any reason to appear and testify fully.

4. To refuse employment to and exclude from employment all persons and employees who were suspected of ever having been Communists or having any associations with Communists and who refused or failed voluntarily to appear before said Committee or its agents and waive and surrender their constitutional rights and privileges and testify or give statements fully disclosing their own political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances [R. 72-73].

(e) Respondents and each of them maliciously and without justification undertook to and did induce and persuade each other, and other employers in the said industry, to desist and refrain from employing and to refuse employment to all such aforesaid persons and employees, with the intent to prevent such employees and other persons from having or obtaining employment in the said motion picture industry [R. 73].

(f) As a part of the aforesaid agreement, and as one of the means of effectuating it, all of the respondents have published and circulated and are now publishing and circulating throughout the entire industry a list containing the names of such employees and other persons with the direction and intent that they be not employed [R. 73].

(g) The purpose of the aforesaid agreement is as follows:

1. To limit, control and direct the political activities of respondents' employees.

2. To coerce and influence said employees through and by means of threat of discharge and loss of employment to refrain from adopting or following any course or line of political action and activity not acceptable to the said House Committee.

3. To limit employment in the motion picture industry to those persons whose political beliefs are acceptable to the said Committee.

4. To limit the production of motion pictures by said industry to those the content of which is acceptable to the said Committee [R. 74].

(h) Petitioners, eighteen in number, appeared on various dates in 1951 and 1952 as witnesses before the said House Committee pursuant to subpoena and refused, re-

spectively, to answer certain questions concerning their political affiliations, beliefs and associations, basing their refusal upon their constitutional rights including the privilege against self-incrimination under the Fifth Amendment to the Constitution [R. 73, 76-78, 80-81, 83-84, 86-91, 93-94, 97-98, 105].

(i) Petitioners, five in number, on various dates in 1951 were named as Communists, respectively, by some witness appearing before the said House Committee. Petitioners failed and refused to voluntarily appear before the said Committee to answer questions concerning their political affiliations, beliefs and associations, basing their refusal upon their constitutional rights including their privilege against self-incrimination under the Fifth Amendment [R. 95, 100-102, 104].

(j) By reason of the acts of and pursuant to the aforesaid agreement of respondents, petitioners ever since the dates aforesaid have been and are refused and excluded from employment in the motion picture industry by these respondents and all other employers in said industry; and petitioners will henceforth continue to find it impossible to obtain employment in the profession to which they have devoted a major part of their entire lives and energies [R. 73, 76-78, 80-81, 86-91, 93-94, 95, 97-98, 100-102, 104, 105].

(k) Petitioners have suffered pecuniary loss and irreparable injury and pray for money damages and injunctive relief [R. 106-8].

How Federal Questions Are Presented.

An original complaint was submitted by these petitioners against respondents on July 17, 1953 and demurrers thereto were sustained with leave to amend on October 5, 1953 [R. 64]. The first amended complaint, the complaint involved herein, was filed on October 19, 1953 [R. 65-108]. A demurrer was filed on behalf of the respondent motion picture producers and distributors [R. 109-36] and sustained by the judge of the Superior Court on August 2, 1954, without leave to amend [R. 152-3]. A separate demurrer to the same amended complaint was filed by the remaining three respondents, the members of the legislative committee and its investigator, on December 15, 1953 [R. 161-2], and sustained, but with leave to petitioners to amend [R. 151]. Petitioners having elected to stand on their amended complaint, the said complaint was dismissed on the motion of the said remaining three respondents on September 14, 1954 [R. 172-3].

A written memorandum was rendered by the judge of the Superior Court in sustaining the aforesaid demurrers to petitioners' complaint (App. B). Disregarding respondents' argument that petitioners were without any legally protected interest because of the absence of an allegation showing that petitioners had an existing contract of employment or a reasonable prospect of one, the *trial court accepted petitioners' standing to sue for the invasion of their rights as set forth in the complaint* (App. B, pp. 21-3). The trial court held, however, that the burden was upon petitioners to plead lack of justification for respondents' conduct, and held that the complaint failed to plead facts showing that respondents' concerted agreement was not justified under the circumstances (App.

B, pp. 23-32). With respect to the remaining three respondents, the court construed the complaint as alleging a purposeful interference by strangers with the possibility of business relations (App. B, p. 32), but held that the facts showing a tortious inducement of the refusal to enter into business relations had not been alleged (App. B, pp. 33-4).

On appeal to the District Court of Appeal, petitioners urged that the trial court had erroneously placed the burden of pleading lack of justification upon petitioners, that the burden of pleading and proving justification for their admitted concerted agreement and wrongdoing was upon respondents, and that the judgments of the Superior Court deprived petitioners of their liberty to pursue their chosen callings in violation of the applicable provisions of the state Constitution and the Fourteenth Amendment to the Constitution of the United States. Respondents, on the other hand, urged that petitioners were without any legally protected interest because of the failure to allege the existence or prospect of a specific contract of employment, and urged further that even if the burden of pleading justification was upon respondents, such justification was apparent in the complaint if the court by judicial notice incorporated into the pleadings allegations that the Communist Party advocates and teaches the forcible overthrow of the Government, that a claim of the privilege against self-incrimination after inquiry concerning membership in the Party gives rise to the inference that the person claiming the privilege is dedicated to the forcible overthrow of the Government, and, by the same process of judicial notice, that employers in the motion picture industry under the circumstances must combine to exclude such persons so claiming their con-

stitutional privilege in order to protect their economic interests which again the court could notice would be jointly affected.

The opinion of the District Court of Appeal (App. A) disregarded the rulings of the Superior Court. The District Court of Appeal held solely that the complaint against all of the respondents was insufficient because no facts were alleged showing interference with any legally protected interest of petitioners; that there was no allegation of an existing or prospective specific contract or business relationship, nor any allegation from which such relationship could be inferred (App. A, p. 16). The Court held that "the most that is alleged is a hope or expectation of employment" (App. A, p. 16) and that this was not a sufficient allegation. The Court stated that "in view of our conclusion, we do not reach other points argued by counsel" (App. A, p. 18). Leave to amend was denied (App. A, pp. 17-18).[1a]

A petition for rehearing was duly filed in the District Court of Appeal by the petitioners [R. 175-188]. The petitioners urged that they had been unlawfully denied leave to amend [R. 176-180]; that the complaint stated at least a cause of action for an injunction, by pleading

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[1a]By way of *dicta*, the court held that it would judicially notice that the Communist Party is "a 'conspiratorial and revolutionary junta,' one of whose objectives is the overthrow of our government by force and violence" (App. A, p. 7), so that an inquiry at a legislative hearing concerning a person's past or present membership in the Communist Party, or the statement of a witness that a person has been such a member, has "nothing whatever to do with their political affiliations" (App. A, p. 7), and such latter allegations in a complaint can be disregarded and the aforesaid facts judicially noted substituted in their place in determining the sufficiency of the complaint. This construction of the complaint, however, was not any part of the court's basis for its affirmance of the judgments of dismissal.

the injury of total exclusions from pursuit of a calling within the motion picture industry, apart from the question as to whether a cause of action for monetary damages was stated [R. 180-4]; and that the holding of the court that petitioners were without legal redress against the admitted wrongdoers who deprived petitioners of their right to pursue their chosen avocations merely because petitioners had not alleged the existence or probability of a contract of employment denied petitioners the equal protection of the laws and deprived them of their liberty and property without due process of law in violation of the equal protection and due process provisions of the Fourteenth Amendment [R. 184-7]. The petition for rehearing was denied [R. 199].

A petition for hearing was thereafter duly filed in the Supreme Court of the State of California [R. 189-246] raising the same aforesaid constitutional questions. The petition for hearing was denied without opinion, Mr. Justice Carter being of the opinion that the petition should be granted [R. 275].

Reasons for Granting the Writ.

The case herein was determined upon demurrer, and the facts properly pleaded may therefore be taken as admitted. *C. B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 565; *Ward v. Love County*, 253 U. S. 17, 23; *Postal Telegraph Cable Co. v. City of Newport*, 247 U. S. 464, 474.[1b] There is thus no dispute on the essential facts. Petitioners seek to pursue their chosen callings in the motion picture industry. Respondents, by force of their monopolistic control of all employment op-

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[1b]The rule is of course the same in California. *Hauger v. Gates*, 42 Cal. 2d 752, 269 P. 2d 609; *Marden v. Bailard*, 124 C. A. 2d 458, 268 P. 2d 809.

portunities in the industry, have agreed in combination that no person shall enter the industry who claims the privilege of the Fifth Amendment in a legislative inquiry, or who is named as a Communist in such inquiry and fails to voluntarily appear before said legislative inquiry and answer all questions without assertion of constitutional privileges. The combination and agreement to act in concert is admitted. It is also admitted that pursuant to this agreement, respondents have circulated a blacklist throughout the entire industry and induced other employers in the industry to refuse employment to all persons covered by respondents' agreement. It is conceded that by reason of the acts of and pursuant to the agreement of respondents, petitioners have been refused and excluded from employment in the industry and will continue to find it impossible to pursue their chosen callings because of the conduct of respondents. No issue of the right of an individual employer to hire or discharge an employee, with or without cause, is presented here. The gist of the wrong is respondents' monolithic combination which concededly makes it impossible for petitioners to enter the market of their choice and dispose of their skills according to their own will free from oppressive interference.

In this posture of the case, with the fundamental right so plainly conceded and the wrongful invasion of the right so freely admitted, the courts below have held that petitioners are without remedy, legal or equitable. The basis of this ruling is that petitioners have alleged no interest which the law can protect because petitioners were duty bound to assert the existence of a contract of employment or the reasonable prospect of one before they could obtain relief from the wrongdoers. In short, the state courts here held that persons deprived of their freedom

to pursue a chosen calling under the Constitution are without remedy unless such persons first obtain the fruits of the calling which the wrongdoer has admittedly made it impossible to obtain.

Since respondents will undoubtedly urge that the aforesaid circuitous reasoning justifies the view that the judgment below rests upon a "non-federal" ground, we treat the issue of this Court's jurisdiction to grant certiorari first, and then pass on to the discussion of the merits of petitioners' claims herein.

1. On the issue of jurisdiction, it is fundamental that a state, acting through its judiciary, may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is or was afforded some real opportunity to protect it. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 682; *Truax v. Corrigan*, 257 U. S. 312, 329. It is also fundamental that when a specific federal right is set up and claimed in a proceeding, the question whether the right was denied, or not given due recognition by the state court is a question as to which the claimants are entitled to invoke the judgment of this Court. It is the province of this Court to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that are plainly untenable. *Ward v. Love County*, 253 U. S. 17, 22; *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 282. "A State court cannot sterilize federal claims by putting on the adjudication a local label." *Angel v. Buffington*, 330 U. S. 183, 190.

We approach the question of jurisdiction, therefore, first by discussing the character of the claimed federal

right, and then by discussing the inadequacy of the ground advanced by the state courts for denying the right.

(a) The liberty to pursue a calling is one of the most fundamental of all constitutional freedoms, as essential as the right to life itself. *Cummings v. Missouri*, 4 Wall. 277, 321; *Truax v. Raich*, 239 U. S. 33, 38. "Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." *Smith v. Texas*, 233 U. S. 630, 636. The right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. *Truax v. Raich, supra*, p. 38. See also, *Meyer v. Nebraska*, 262 U. S. 390, 399; *Pierce v. Society of the Sisters*, 268 U. S. 510, 534; *Takahashi v. Fish Comm'n*, 334 U. S. 410, 421.

The Constitution does more than protect the choice of a calling; it protects the right *to pursue* a calling. It is the characteristic of the right that it shall not be held "at the mere will of another" (*Yick Wo v. Hopkins*, 118 U. S. 356, 370) and that it shall be exercised freely "and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion" the pursuit of a chosen avocation or livelihood (*Allgeyer v. Louisiana*, 165 U. S. 578, 589). ". . . and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired." *International News Service v. The Associated Press*, 248 U. S. 215, 236. Thus, the right to pursue a common calling must necessarily include the

right to negotiate with prospective employers or customers free from unlawful restrictions and burdens. "It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our Constitution recognizes no such notion." *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 742, 65 Atl. 165, 171.

(b) The rejection of petitioners' claimed federal rights, on the undisputed state of the record, for the reasons given by the state courts cannot defeat this Court's jurisdiction to decide the federal questions here presented, it is respectfully submitted. In the first place, by its necessary operation and effect, the judgments below reject the claims of the petitioners which specifically set forth a wrongful deprivation of their right to pursue a livelihood with prayers for money damages and injunctive relief. The federal questions thus presented covered the whole case, and were of such a nature that the rights of the petitioners could not be finally determined without deciding the federal questions.

In ruling that no relief, legal or equitable, was available to petitioners to protect their constitutional right to pursue a calling unless they first obtained a contract of employment or demonstrated a prospect of a specific contract in the motion picture industry, the judgments of the state court necessarily denied petitioners' claims under

the Constitution and this Court has jurisdiction to inquire whether petitioners' claims should be sustained, at least to the extent of putting the admitted wrongdoer to the proof justifying their conduct. *West Chicago Street Railroad Co. v. Illinois,* 201 U. S. 506, 519-20. "The claim of a federal right or immunity specifically set up from the outset went to the very root of the case and dominated every part of it." *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 276, 283; *Rogers v. Alabama,* 192 U. S. 226, 230; *St. Louis S. W. Ry. Co. v. Arkansas,* 217 U. S. 136, 148-9. As Mr. Justice Holmes stated in *Rogers v. Alabama, supra,* p. 230:

> "It is a necessary and well established rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

In the second place, not only do the judgments below necessarily deny petitioners' asserted federal rights, but the grounds of the denial are so interwoven with the federal questions presented by petitioners as not to be an independent matter or sufficiently broad to sustain the judgments without any decision of the federal question. The state courts did not uphold petitioners' constitutional rights, and bar relief because of an independent matter such as construction of a private contract, waiver, estoppel, laches or statute of limitations. On the contrary, the courts decided that petitioners were without right to the protections of the courts against wrongful invasion of petitioners' freedom to pursue their callings unless petitioners first obtained a contract or could prove a reasonable prospect of one. In order to decide the validity of the ruling of the courts below, it becomes essential there-

fore to decide the breadth and scope of the constitutional protection for the federal right which petitioners asserted. Under such circumstances, the jurisdiction of this Court appears plain. *Creswill v. Knights of Pythias,* 225 U. S. 219, 261; *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 475; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Abie State Bank v. Bryan,* 282 U. S. 765, 773.

In the third place, the grounds advanced by the state courts for denying petitioners any redress are clearly untenable because the grounds are themselves constitutionally invalid or at least raise constitutional questions which this Court alone can decide. As was indicated in the discussion aforesaid on the nature and character of the fundamental right to pursue a calling, it is rationally impossible to draw a distinction between a right of employment in a chosen calling and a right to acquire employment in the same calling. It is simply arbitrary and capricious to hold that as against an admitted wrongdoer, courts will afford protection of the constitutional right to work for a living if the wrongdoer has induced a breach of contract or the reasonable expectancy of one, but will decline to give any remedy for the wrong, even as to the future, if those who are deprived of their right to pursue a calling are unable to prove that their plain right has ripened into fruition. This would be a sheer deprivation of liberty without due process of law. *Truax v. Corrigan,* 257 U. S. 312. The constitutional right to earn a living surely exists for the unemployed as well as the employed. Where "the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question," this Court's

jurisdiction is clear. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

In addition, the ruling of the courts below operates to deny petitioners the equal protection of the laws. Its effect is to give the fullest protection of the law to those who have a contract of employment or reasonable prospect of one. No protection is given to one who seeks to earn a living, who seeks to compete with others in his chosen calling. Such a classification is arbitrary and without any substantial basis in fact or reason, placing as it does the maintenance of private contracts on a higher scale in our constitutional system than the right to pursue a calling. See, *Truax v. Raich*, 239 U. S. 33. The ruling also grants immunity to one class of wrongdoers while subjecting another class to legal sanctions without any reasonable basis for such classification. See *Yick Wo v. Hopkins*, 118 U. S. 356, 370. Moreover, to grant immunity to one class of persons (the respondents here) so as to deprive another class (the petitioners here) of personal or property rights is itself a denial of equal protection of the laws. *Truax v. Corrigan*, 257 U. S. 312, 333.

It therefore appears that the grounds advanced below for denying petitioners their claimed federal rights are themselves intrinsically violative of petitioners' liberties, raise questions of constitutional importance which again only this Court can decide, and are therefore not sufficiently independent of the federal questions involved in the entire case to defeat this Court's jurisdiction. Where the specific state court ruling restricts, undermines or destroys a federal right under the laws of Congress or the Constitution, this Court has jurisdiction to review. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464,

475-6; *American Railway Express Co. v. Levee,* 263 U. S. 19, 21; *Hill v. Smith,* 260 U. S. 592, 594; *Young v. Ragen,* 337 U. S. 235, 238.

Finally, it is submitted that a fair reading of the uncontradicted allegations contained in petitioners' complaint does not support the finding upon which the opinion of the state court was grounded. This Court of course must itself decide whether a pleading sufficiently sets up a claim of right under the federal Constitution. *Boyd v. Thayer,* 143 U. S. 135, 181; *Carter v. Texas,* 177 U. S. 442, 447; *First National Bank v. Anderson,* 269 U. S. 341, 345-6. "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." *Davis v. Wechsler,* 263 U. S. 22, 24. See, to the same effect, *Brown v. Western R. of Alabama,* 338 U. S. 294, 296. Moreover, it is settled that this Court will review a state court's findings where a federal right has been denied as the result of a finding shown by the record to be unwarranted and without support; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Union Pac. R.R. Co. v. Pub. Serv. Comm'n,* 248 U. S. 67, 69; *Pollock v. Williams,* 322 U. S. 4, 13, n. 21; *Niemotko v. Maryland,* 340 U. S. 268, 271; *Hooven & Allison Co. v. Evatt,* 324 U. S. 652, 659.

It is in this light that petitioners' pleading below should be examined. A fair reading of the complaint reveals that petitioners not only were possessed of an established background of experience in their chosen calling, but

that the likelihood and expectancy of obtaining employment in the industry was reasonably certain if the admitted wrongful conduct of respondents had not made this impossible. Each of the petitioners allege that he or she "has devoted a major part of his entire life and energy" in the motion picture industry [R. 74 *et seq*]. It is admitted that each has had from more than five to twenty-five years' experience in their professions [R. 66 *et seq.*]. It is also alleged, and not denied, that the respondents well knew that each of the petitioners "has acquired a reputation for excellence of work in the motion picture industry and has won high esteem" [R. 66 *et seq.*]. Moreover, the complaint alleges, and it is not denied, that "as a result thereof and by reason of the acts of and pursuant to the agreement of the defendants," petitioners have been refused and excluded "from employment in the said industry" [R. 73 *et seq.*]. "Therefore" said petitioners "will henceforth continue to find it impossible to obtain employment in the profession" unless the injunctive relief prayed for is granted [R. 73-4 *et seq.*].

The aforesaid allegations, it is respectfully submitted, fairly construed, showed that petitioners possessed the experience, esteem and reputation in the industry which justified the conclusion that they could reasonably expect to obtain employment in the industry, and that it was solely because of respondents' conduct that petitioners were unable to contract and dispose of their labor, art and skill. *Cf., Brown v. Western R. of Alabama*, 338 U. S. 294. This erroneous construction of the pleading appears to be the result of a confusion between the principles applicable to a wrongful deprivation of a right to pursue a calling and the tortious inducement of the breach

of a specific or contemplated specific contract or advantage.[2]

The gravamen of the complaint here plainly is the concerted and wrongful deprivation of the right to pursue a calling, the liberty to follow one's chosen employment. *Parker v. Lester*, 227 F. 2d 708, 717 (C. A. 9, 1955). The courts below appear to have fallen in the error of denying all redress, legal and equitable, for such admitted injury upon the mistaken assumption that the petitioners would find it difficult to prove any ascertainable damages. Fundamental rights, when plainly invaded, however, are not unprotected merely because the wrongdoer has made the extent of his wrongdoing uncertain. See, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 252; *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 266; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555, 564; *Angle v. Chicago, St. P. Elec. Ry.*, 151 U. S. 1, 10.[3] Moreover, the complaint clearly alleges a cause of action for equitable relief from any further invasion of petitioners' asserted federal rights, and it was a palpable denial of due process to withdraw even this protection from the petitioners.

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[2]The sole California decision relied upon by the Court below, *Campbell v. Rayburn*, 129 Cal. App. 2d 232, 276 P. 2d 671, and the cases cited therein [R. 259] did not deal with the constitutional right to earn a living or pursue a business, but the loss of a specific contract or advantage. In none of these situations was it alleged or proved that the complainants had been deprived of the right to follow their chosen calling.

[3]See also, *Louis Kamm, Inc. v. Flink*, 113 N. J. L. 582, 175 Atl. 62, 68; *Godin v. Niebhur*, 236 Mass. 350, 128 N. E. 406, 407; *Doremus v. Hennesay*, 176 Ill. 608, 52 N. E. 924, 925-6; *Meadowmoor Dairies v. Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. 2d 308; Cooley, *Torts* (4th ed.), vol. 2, Sec. 230, pp. 196-7; Prosser, *Torts* (1955), Sec. 107, pp. 745-8; *Restatement of Torts*, Sec. 766, p. 52; 86 C. J. S., *Torts*, Sec. 43, p. 955.

Truax v. Raich, 239 U. S. 33, 38; *International News Service v. The Associated Press*, 248 U. S. 215, 236.[4]

For all of the foregoing reasons, it is submitted that this Court has jurisdiction to review the substantial federal questions presented in this petition for a writ of certiorari, to a discussion of which questions we now turn.

2. On the merits, the case herein bristles with substantial federal questions which should be decided by this Court. The courts below have decided these questions in a way not in accord with applicable decisions of this Court. Moreover, the central federal question is one of substance not heretofore determined by this Court.

If the respondents, monopolizing all employment opportunities in the motion picture industry, had agreed among themselves to hereafter exclude all Negroes, Republicans or Jews from the industry, and the state courts had refused all redress to the persons affected, it appears clear that this Court would consider the matter ripe for adjudication. *United Public Workers v. Mitchell*, 330 U. S. 75, 100; *Wieman v. Updegraff*, 344 U. S. 183, 191. A state court which upheld such an agreement would, of course, put the sanction of government behind it. *Shelley v. Kramer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24; *Barrows v. Jackson*, 346 U. S. 249. The central issue here is whether affected persons following a like calling are without similar recourse to the Constitution when the agreement by the same monopolistic combination excludes from the industry all those who claim

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[4] ". . . . . a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." Mr. Justice Holmes in *Swift and Co. v. United States*, 196 U. S. 375, 395.

the privilege against self-incrimination guaranteed by the federal Constitution before a federal legislative inquiry, or who, when named as Communists in such legislative inquiry, fail to voluntarily appear and answer all questions without invocation of their Constitutional privileges.

It is important to note at the outset that this is not a suit against an individual employer for breach of contract of employment, nor a suit against a third party for inducing a breach of such contract. "The evil is in the combination." *United States v. Reading Co.*, 226 U. S. 324, 353. Each of the parties to the agreement have surrendered their power of decision and agreed to abide by the will of the combination. Petitioners are powerless to enter the market and negotiate with free employers on a free basis. Respondents admittedly monopolize all employment opportunities and petitioners have no means to neutralize the conduct of respondents by dealing with other individual employers. Indeed, it is admitted that the combination makes this an utter impossibility by overtly inducing other employers to abide by the terms of respondents' agreement and by the circulation of a blacklist throughout the industry. Competition among employers for employees, as well as among employees for employers, is effectively throttled. The right of petitioners to pursue their chosen callings is permanently ended.

It is also important to note that this case arises on demurrer. Respondents have neither pleaded a general denial nor justification for their conduct. Thus, the petitioners, while pleading a complete deprivation of their right to earn a living, have been denied all redress in the courts without the need for the admitted wrongdoers

to either plead or prove that their conduct was warranted. It is difficult to posit a more flagrant instance of denial of due process of law. Mr. Justice Holmes stated in *Aikens v. Wisconsin,* 195 U. S. 194, 204:

> "It has been considered that, *Prima facie,* the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."

See also, *Owen v. Williams,* 322 Mass. 356, 360, 77 N. E. 2d 318; *Carnes v. St. Paul Stockyards Co.,* 164 Minn. 457, 463, 205 N. W. 630; Bohlen, *Incomplete Privileges to Inflict Intentional Invasions of Interests,* 39 Harv. L. Rev. 307; 84 Am. L. Rep. 43, 79; 26 Am. L. Rep. 2d 1227, 1263.

It is also significant to note initially what the primary purpose of this admitted monopolistic combination is. This combination has arrogated to itself the power, and has for its object, the exclusion of all persons in the United States from their chosen callings in an entire industry who have exercised a federal right in a federal forum, or who have failed to surrender all their constitutional privileges when merely "named" as Communists in a legislative investigation. Petitioners concededly therefore cannot earn their livelihoods solely because, according to the mandate of the combination, they have exercised federal rights or refused to forego them in a federal forum. In short, what the Constitution forbids the government of the United States to do, this nongovernmental combination has undertaken to accomplish. *Cf., Associated Press v. United States,* 326 U. S. 1, 20. Nor has the combination even been required by government, up to this point, to even plead and prove the justi-

fication for snuffing out so summarily the constitutional rights of persons in the United States. See, *Restatement of Torts,* Section 765, Comment a.[5]

Determination of the issues presented in this proceeding requires, therefore, consideration of substantial federal questions and the legal principles applicable thereto.

(a) In a variety of situations, this Court has held that an act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed. *Grenada Lumber Co. v. Mississippi,* 217 U. S. 433, 440; *United States v. United States Gypsum Co.,* 333 U. S. 364, 401; *Steele v. Bulova Watch Co.,* 344 U. S. 280, 287; *Binderup v. Pathe Exchange,* 263 U. S. 291, 312. Lawful acts may become unlawful when taken in concert. "When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part." *Aikens v. Wisconsin,* 195 U. S. 194, 205.

A monopoly of all employment opportunities in an industry does not merely relate to business relations, it

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[5]The evils flowing from the monopolistic control of these respondents has been the subject of recurrent critical comment. Note, *Monopolies, the Motion Picture Industry,* 15 Univ. of Detroit L. J. 178 (1952); Marcus, *Antitrust Laws and the Right to Know,* 24 Ind. L. J. 513, 533 (1949); McDonough and Winslow, *The Motion Picture Industry,* 1 Stanf. L. Rev. 385 (1949). See, *United States v. Paramount Pictures, Inc.,* 334 U. S. 131.

affects the fundamental right to work for a living. What the individual employers can do, severally, by independent action, is essentially different from what they may do collectively, pursuant to an agreement between themselves and by concerted action thereunder.

(b) Respondents are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. They have been given no power to require citizens to surrender their constitutional privileges. More than this, respondents have purported to do what the Government itself cannot do. Clearly, legislation, which excluded all persons from the motion picture industry who claimed a privilege guaranteed by the Constitution or who declined to surrender their constitutional privileges when named in some legislative inquiry as Communists, would collide with the fundamental law. *Cf., United States v. Lovett,* 328 U. S. 303. Respondents have been relieved by the state courts of any need to prove justification for their concerted conduct, but it is doubtful that the respondents can ever justify the taking of the law in their own hands under the circumstances of this case. The conduct of these respondents trenches upon the supreme law of the land which guarantees the exercise of fundamental rights and privileges. Private choice of means to obtain particular employees in an industry "must yield to the national authority thus exerted." *Eastern States Lumber Ass'n v. United States,* 234 U. S. 600, 613. See also, *Fashion Guild v. Federal Trade Comm'n,* 312 U. S. 457, 465; *American Medical Ass'n v. United States,* 130 F. 2d 233, 248 (C. A. D. C. 1942), aff'd 317 U. S. 519; *United States v. Gypsum Co.,* 333 U. S. 364, 400; *United States v. Motion Picture Patents Co.,* 225 Fed. 800, 808 (D. C. E. D. Pa., 1915).

(c) The character of the rights, the exercise of which this admitted monopolistic combination seeks to punish, should also be noted. So long as the Constitution of the United States remains the supreme law of the land, it can hardly be disputed that the Fifth Amendment stands on equal parity with all other provisions of the federal law. In a series of recent decisions this Court has itself emphasized the vitality of the Fifth Amendment, its importance in the protection of the innocent, and the need to protect the Amendment from subtle encroachments by public or private agencies. *Slochower v. Board of Higher Education,* 350 U. S. 551, 557; *Ullmann v. United States,* 350 U. S. 422, 426; *Quinn v. United States,* 349 U. S. 155, 161; *Emspak v. United States,* 349 U. S. 190, 194. See also Griswold, *The Fifth Amendment Today* (1955), pp. 2-7; Wigmore, *Evidence* (3rd ed.), Sec. 2250; Cooley, *Constitutional Limitations* (8th ed., 1927), vol. 1, p. 647. This Court recognized the privilege guaranteed by the Fifth Amendment as "one of the most valuable prerogatives of the citizen." *Slochower v. Board of Higher Education, supra,* p. 557. And this Court warned in *Emspak* against perversions of the Amendment's meaning and significance:

> "Otherwise, the great right which the Clause was intended to secure might be effectively frustrated by private pressures." *Supra,* p. 195.

There is a tangential ruling by the court below which points up the infirmity in its decision and in itself requires review by this Court. In its decision, the court below held that the complaint could be implemented by "judicial notice" so that the questions put to petitioners in the legislative inquiry concerning membership in the Communist Party were not, as alleged, questions con-

cerning their "political affiliations," but questions concerning "a conspiratorial and revolutionary junta, one of whose objectives is the overthrow of our government by force and violence" [R. 255]. Therefore, the purpose of the agreement was not to limit and control petitioners' "political activities" as alleged in the complaint, but to limit the activities of those dedicated to forcible overthrow of the Government [R. 257]. Thus, the state courts took judicial notice that an inquiry concerning solely membership in the Communist Party was the same as an inquiry concerning membership in an organization dedicated to the forcible overthrow of the Government, and that refusal to answer an inquiry concerning membership in the Party upon a claim of the privilege against self-incrimination justified the inference as a matter of law that the persons so claiming the privilege were dedicated to the forcible overthrow of the Government.

While the court below did not answer the question whether, even so, the admitted monopolistic combination here was justified in depriving petitioners of their right to earn a living as guaranteed by the Constitution, still it is plain that this peripheral ruling raises substantial federal questions which this Court should adjudicate. From *Schneiderman v. United States,* 320 U. S. 118, to *Dennis v. United States,* 341 U. S. 494, this Court has constantly declined to take judicial notice that the Communist Party advocates the forcible overthrow of the Government. Mr. Justice Reed in *Bridges v. United States,* 346 U. S. 209, 234, stated that "there is no necessary identity in law between Communist Party members" and persons who advocate the forcible overthrow of the Government. See, Section 4(f) of the Internal Security Act (50 U. S. C. 783f). The extension of the doctrine of judicial notice under such circumstances so as to de-

prive persons of their chosen callings constitutes arbitrary state action and a denial of due process of law under the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183; *Ohio Bell Tel. Co. v. Comm'n*, 301 U. S. 292, 301-2. In similar vein, a ruling that one who declines to answer a question concerning membership in the Communist Party upon the grounds of the Fifth Amendment is inferentially a person who advocates the forcible overthrow of the Government runs counter to the Constitutional provision, and sanctions imposed thereby are arbitrary and violative of due process of law. *Slochower v. Board of Higher Education*, 350 U. S. 551, 557; *Ullman v. United States*, 350 U. S. 422, 426; *Quinn v. United States*, 349 U. S. 155, 164; *Emspak v. United States*, 349 U. S. 190, 195; Griswold, *The Fifth Amendment Today* (1955); Wigmore, *Evidence* (3rd ed.), vol. VIII, Secs. 2251, 2272a, pp. 308-10, 425.

Finally, the concerted agreement by this monopolistic combination to deprive persons of their calling who are named as Communists in a federal legislative inquiry and who fail to voluntarily appear before the inquiry and answer all questions without invocation of constitutional privileges arrogates powers to this non-governmental group which are denied even to the Government itself and to all its agencies. Under 2 U. S. C. 192, no witness is required to appear before a federal legislative inquiry unless he has been duly "summoned as a witness." Questions must be "pertinent to the question under inquiry" before contempt sanctions can be invoked. The witness may properly invoke his constitutional privileges when the legislative investigation is used to inquire into private affairs unrelated to a valid legislative purpose, or into an area in which Congress is forbidden to legislate. "Still further limitations on the power to investigate are

found in the specific individual guarantees of the Bill of Rights, . . ." *Quinn v. United States,* 349 U. S. 155, 161. There is no power in Government to sweep these rights away; yet the heavy hand of this combination "falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." *Slochower v. Board of Higher Education,* 350 U. S. 551, 558.

It is submitted that the stated purposes and objects of the concerted agreement by the respondents, resulting as it has in the deprivation of fundamental liberties guaranteed by the Constitution, runs afoul of the fundamental law and that the state's action upholding such an agreement should be reviewed by this Court.

(d) The conduct of respondents in thus depriving petitioners of their fundamental right to earn a living was both unlawful in its object and its method, in other respects. In the first place, the object of the monopolistic combination was to interfere with the exercise of a federal right in a federal forum. The state courts have sanctioned an invasion of this right by depriving petitioners of their liberty to work because petitioners exercised legal and constitutional privileges and immunities in such federal jurisdiction. Congress, however, has protected the exercise of these rights by specific enactment. 18 U. S. C. 241 makes it a criminal offense punishable by fine and imprisonment for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, *or because of his having so exercised the same*" (emphasis supplied). See also, 18 U. S. C. 242. These laws have been upheld as a valid exercise

of Congressional power, and under the supremacy clause of the Constitution are binding upon the states. Constitution, Article VI. See, *Hague v. C. I. O.*, 307 U. S. 496; *Logan v. United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532; *Motes v. United States*, 178 U. S. 458. The agreement of respondents is therefore contrary to an express provision of law, as well as to the policy of express law. See, Restatement of Torts, Sec. 765, Comment d, p. 45.

In the second place, the overt acts committed by the respondents pursuant to their concerted agreement were *per se* wrongful. Respondents not only induced each other, but also induced other employers in the industry to deny employment to petitioners. The denial of any remedy against those who inflict intentional harm by inducing others not to enter into employment relations with persons seeking work is a violation of due process of law. "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." *Truax v. Raich*, 239 U. S. 33, 38. See also, *Angle v. Chicago, St. Paul etc. Ry.*, 151 U. S. 1.

In the third place, the circulation of a blacklist by a monopolistic combination of employers who control all employment opportunities in an industry is as much an unlawful deprivation of the right to work as would be the commission of such overt acts as fraud, violence, coercion and intimidation. "The evil of blacklisting rests in the power wielded by a combination to exclude named

persons from pursuing their occupation in certain regions or industries." Note, *Liability for Blacklisting Under the Prima Facie Tort Doctrine,* 51 Col. L. Rev. 398, 399 (1951). See *Fashion Guild v. Fed. Trade Comm'n,* 312 U. S. 457; *Aikens v. Wisconsin,* 195 U. S. 194; *Carlson v. Carpenter Contractors Ass'n,* 305 Ill. 331, 137 N. E. 222.

(e) The complaint alleges that the ultimate aims of the monopolistic combination are to limit and control the political activities of their employees, to coerce said employees to refrain from following any course of political activity not acceptable to the legislative committee, to limit employment in the industry to those persons whose political beliefs are acceptable to the legislative committee and to limit production of motion pictures to those the content of which is acceptable to the said committee [R. 74 *et seq.*]. As discussed aforesaid, the state court held that the complaint does not allege what is plainly alleged, reaching its conclusion by the process of "judicial notice" and inferences of wrongdoing solely from the invocation of a claim of the privilege against self-incrimination. But since this Court is not concluded by the view taken by the state court as to the sufficiency of the allegation when a federal right and privilege is invoked (*Boyd v. Thayer,* 143 U. S. 135, 180), and since the action of the state court was in this respect inconsistent with due process of law as previously discussed, it would follow that the stated additional objectives of this admitted monopolistic combination were clearly unlawful. Neither the legislative committee nor these respondents could combine to deprive petitioners of their livelihood in order to effect a censorship of petitioners' beliefs, opinions and associations. *J. Burstyn, Inc. v. Wilson,* 343 U. S. 495; *Su-*

perior Films v. Dept. of Ed., 346 U. S. 587; *West Va. State Board of Education v. Barnette*, 319 U. S. 624.

3. The complaint was also dismissed, on demurrer, as against the remaining three respondents, the two members of the legislative committee and its investigator. The complaint alleged that these respondents both in their official capacity and individually in non-official capacities [R. 72 *et seq.*] had entered into the concerted agreement with the other respondents with the same objects and purposes, had induced other employers in the industry in the same manner not to employ petitioners and circulated the blacklist in order to carry out the purposes of the monopolistic combination. The court below held that the complaint had been properly dismissed for the same reasons that the complaint had been dismissed against the other respondents [R. 272]. The same federal questions are therefore presented here and we do not repeat our prior discussion. The court below did not pass upon another argument advanced by the remaining three respondents that they could not be sued for the same acts both in their official and personal capacities [R. 272-3]. Aside from the fact that total relief cannot be denied for deprivation of a federal right when the pleading sets forth a supportable claim on at least one theory (*Lewis v. Brautigam*, 227 F. 2d 124, 127, C. A. 5, 1955), no immunity exists in law for public officials who have criminally or tortiously deprived persons of their fundamental rights, whether such persons acted in their "official" or "private" capacities. See, *Ex parte Virginia*, 100 U. S. 339, 348; *United States v. Bramblett*, 348 U. S. 503; *Picking v. Pa. R.R. Co.*, 151 F. 2d 240 (C. A. 3, 1945).

Conclusion.

This Court has jurisdiction to review the substantial federal questions here presented. The petition for a writ of certiorari should be granted, the judgments of the court below reversed, and the parties put to their proof.

Respectfully submitted,

ROBERT W. KENNY,
BEN MARGOLIS,
Attorneys for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion and Judgments of the District Court of Appeal.

In the District Court of Appeal of the State of California. Second Appellate District. Division Three.

Michael Wilson, *et al.*, Appellants, vs. Loew's Incorporated, a corporation *et al.*, Defendants; Association of Motion Picture Producers, Inc., *et al.*, Respondents. Civil Nos. 20769, 21100.

Filed June 11, 1956.

Appeals from judgments of the Superior Court of Los Angeles County. Ellsworth Meyer, Judge. Affirmed.

Kenny & Morris, Thomas G. Nueson, Margolis, McTernan & Branton and Robert W. Kenny for Appellants.

Irving M. Walker, Herman F. Selvin, Loeb & Loeb, O'Melveny & Myers, Mitchell, Silberberg & Knupp, Freston & Files, Wright, Peeler & Garrett, Joseph S. Dubin and Oliver B. Schwab for Respondents in Civ. No. 20769.

Guy Richards Crump and Slate & Sawtelle for Respondents in Civ. No. 21100.

Appeals from two judgments of dismissal. The case is here on an amended complaint, referred to as the complaint. There are 23 plaintiffs and 23 counts. All of the defendants except three are motion picture producers and distributors. Two of the three remaining defendants are members of the Committee on Un-American Activities of the United States House of Representatives and the third is an investigator for that Committee. A demurrer of the motion picture producers and distributors

was sustained without leave to amend and judgment of dismissal entered. One of the appeals is from that judgment. Demurrers of the three remaining defendants to the amended complaint were sustained with leave to amend. Plaintiffs declined to amend and judgment of dismissal followed. The other appeal is from that judgment.

Each count of the complaint relates to only one plaintiff. The counts are identical except for personal data. A statement of the first count will suffice as a statement of the pleading as a whole. It alleges:

1. Plaintiff Wilson is by profession a motion picture writer; has had more than 5 years experience as a writer; has acquired a reputation for work in the motion picture industry; has won high esteem as a writer in that industry; all of which defendants at all times knew.[1]

2. The corporate defendants are engaged in the production and distribution of motion pictures. The corporate and individual defendants, other than the Committee members and the investigator, control directly and indirectly all motion picture production and distribution in the United States and [193] all motion picture employment opportunities for actors, writers, directors, producers, and other employees in that industry.

3. Defendant members of the Committee on Un-American Activities and the investigator at all times and with respect to the matters alleged "acted both in their official capacity with relation to said House Committee

[1]The allegations with respect to the other plaintiffs are identical except that those who are not writers are alleged to be actors, actresses, a story editor, a research worker, and a grip, respectively, with experience ranging from "more than 5" to "more than 25" years.

on Un-American Activities and individually in non-official capacities."

4. Prior to March 1951 and continuously thereafter defendants, and each of them, agreed with each other to refuse employment to, and exclude from employment in the motion picture industry the following persons:

a. All employees and persons seeking employment who had been or thereafter were subpoenaed as witnesses before the Committee on Un-American Activities of the House of Representatives and who refused on constitutional grounds to answer questions "concerning their political affiliations, associations and beliefs."

b. All employees in the industry and persons seeking employment therein who were named before the Committee as Communists or who were subpoenaed to appear as witnesses before the Committee, or who were suspected of ever having been Communists or of ever having had associations with Communists, and who refused or failed to appear before the Committee and waive and surrender their constitutional rights and testify or give statements fully disclosing "their own political affiliations, association and beliefs and those of their family, friends, associates and acquaintances."

c. Defendants, with the intent to prevent such employees and other persons from having or obtaining employment in the motion picture industry, maliciously and without justification undertook to and did induce and persuade each other and other employers in the industry to desist and refrain from employing and to refuse employment to all such employees and other persons.

d. All defendants, as a part of the agreement and as one of the means of effectuating it, have published and cir-

culated throughout the entire motion picture production and exhibition fields a list containing the names of such employees and other persons with the direction and intent that they be not employed. Plaintiff contends defendants wrongfully, maliciously, and without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the industry and [194] to pursue their professions and occupations therein, and have prevented their employment therein.

5. On September 20, 1951 plaintiff Wilson appeared before the Committee pursuant to subpoena. He there refused to answer certain questions "concerning his political affiliations, beliefs and associations" basing his refusal on his constitutional rights, including the privilege against self-incrimination.

6. As a result of such refusal and by reason of the acts of and pursuant to the agreement of defendants, Wilson ever since September 20, 1951 has been and he now is refused and is excluded from employment in the industry. Therefore he will henceforth continue to find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy.

7. It is plaintiff's belief that the purpose of the agreement is to limit, control, and direct the political activities of defendants' employees; to coerce and influence them through and by means of threat of discharge and loss of employment from adopting or following any course or line of political action and activity not acceptable to the Committee; to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee; and to limit the production of motion pic-

tures by the industry to those the content of which is acceptable to the Committee.

8. Plaintiff has been damaged in the sum of $1,000,000 for loss of opportunity of employment in the industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting humiliation and anguish; in the sum of $250.000 for the jeopardizing of employment opportunities in other industries because of the necessity of disclosing the reasons for his inability to obtain employment in the industry; and in the sum of $1,000,000 as punitive damages.

The allegations in respect to the appearance of all but five of the plaintiffs before the Committee are, save for dates, identical. In each instance the appearance before the Committee was after the alleged making of the agreement. As to the five who did not appear, the averments are that each was named as a Communist by a witness appearing before the Committee; that each refused to appear before the Committee to answer questions concerning his or her "political affiliations, beliefs and associations," basing such refusal on his or her constitutional rights including the privilege against [195] self-incrimination; as a result of the acts of and pursuant to the agreement, they have been refused and excluded from employment in the industry by defendants and all other employers therein; and they will henceforth find it impossible to obtain such employment. In each instance the refusal to appear was after the making of the alleged agreement.

The prayer is for money damages of $2,250,000 on each count and for an injunction.

The amended complaint is to be implemented by the facts of which we take judicial notice. In considering

a demurrer to a complaint, facts judicially noticed are deemed a part of the complaint even when the pleading contains an express allegation to the contrary.[2] We take judicial notice of the proceedings and reports of the Committee on Un-American Activities.[3] The proceedings and reports of the Committee show that each of 18 of the 23 plaintiffs was asked by the Committee whether he or she was then or ever had been a member of the Communist Party. Each refused to answer, asserting his or her constitutional privilege against self-incrimination. Each of the other 5 plaintiffs was stated to be a Communist by a witness before the Committee and on the same grounds refused to appear and state whether he was then or ever had been a member of the Communist Party. The refusals occurred in the course of hearings held as part of a Congressional investigation by the Committee on Un-American Activities of the House of Representatives acting within the scope of its

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[2]*Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23; *Loranger v. Nadeau*, 215 Cal. 362, 365; *Hammell v. Britton*, 19 Cal. 2d 72, 75; *Weil v. Barthel*, 45 Cal. 2d 835, 837.

[3]Code Civ. Proc., sec. 1875(3); *Arizona v. California*, 283 U. S. 425, 75 L. Ed. 1154, 51 S. Ct. 522 Footnote 4; *Greeson v. Imperial Irr. Dist.*, 9 Cir., 59 F. 2d 529, 531; *Louisville Gas & Electric Co. v. Federal Power Com'n.*, 6 Cir., 129 F. 2d 126, 134, cert. den. 318 U. S. 761, 87 L. Ed. 1133, 63 S. Ct. 559; *Overfield v. Pennroad Corporation*, 3 Cir., 146 F. 2d 889, 898; *Stasiukevich v. Nicolls*, 1 Cir., 168 F. 2d 474, 479; *Osage Nation of Indians v. United States*, 97 F. Supp. 381, 403, cert. den. 342 U. S. 896, 96 L. Ed. 672, 72 S. Ct. 320; *Rank v. Krug*, 90 F. Supp. 773, 781; *United States v. Aluminum Co. of America*, 1 F. R. D. 71; *Mullan v. State*, 114 Cal. 578, 582; *Davis v. Whidden*, 117 Cal. 618, 623; *French v. Senate of State of California*, 146 Cal. 604, 608; *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal. App. 2d 592, 602. *Cf. Parker v. James Granger, Inc.*, 4 Cal. 2d 668, 677, cert. den. 298 U. S. 644, 80 L. Ed. 1375, 56 S. Ct. 943; *Arnold v. Universal Oil Land Co.*, 45 Cal. App. 2d 522, 529; *El Zarape etc. Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 346.

authority into Communist in [196] filtration of the motion picture industry,[4] for the protection of the internal security of this Nation and the public disclosure of the forces that menace the United States. It thus appears, contrary to the allegations of the complaint, that the questions which the 18 plaintiffs refused to answer and that the statements which the 5 refused to appear and give had nothing whatever to do with their political affiliations, associations, or beliefs but concerned their membership in a "conspiratorial and revolutionary junta"[5] one of whose objectives is the overthrow of our government by force and violence,[6] a malignant force which

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[4]Act of August 2, 1946, c. 753, Title I, Pt. 2, sec. 121(q), 60 Stat. 828; Senate Doc. No. 26, 80th Congress, 1st Session; *Dennis v. United States*, App. D. C., 171 F. 2d 986, 987-8, aff. 339 U. S. 162, 94 L. Ed. 734, 70 S. Ct. 519; *Lawson v. United States*, App. D. C., 176 F. 2d 49, 51-2, cert. den. 339 U. S. 934, 94 L. Ed. 1352, 70 S. Ct. 663; *Barsky v. United States*, App. D. C., 167 F. 2d 241, 250, cert. den. 334 U. S. 843, 92 L. Ed. 1767, 68 S. Ct. 1511.

[5]Concurring opinion of Mr. Justice Jackson, *American Communications Assoc. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 764.

[6]*Menace of Communism*, Senate Doc. No. 26, 80th Congress, 1st Session; *Report on the Communist Party of the United States as an Advocate of Overthrow of Government by Force and Violence*, House Report No. 1920, 80th Congress, 2d Session; House Doc. No. 251, 83rd Congress, 2d Session, 100 Congressional Record 80; *Communism in Action*, House Doc. No. 754, 79th Congress, 2d Session; Labor Management Relations Act, 1947, Sec. 1 *et seq.*, 29 U. S. C. A. Supp. sec. 159(h), *American Communications Asso. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 764; Internal Security Act of 1950, sec. 1 *et seq.*, 50 U. S. C. A. sec. 781 *et seq.*; Communist Control Act of 1954, Sec. 1 *et seq.*, 50 U. S. C. A. Supp. sec. 841 *et seq.*; Government Code, sec. 1027.5; *National L. R. Bd. v. Highland Park Mfg. Co.*, 341 U. S. 322, 95 L. Ed. 969, 71 S. Ct. 758; concurring opinion of Mr. Justice Jackson in *Dennis v. United States*, 341 U. S. 494, 564-5, 95 L. Ed. 1137, 1181, 71 S. Ct. 857; *Galvan v. Press*, 347 U. S. 522, 529, 98 L. Ed. 911, 74 S. Ct. 737; *Rosenberg v. United States*, 2 Cir., 195 F. 2d 583, cert. den. 344 U. S. 838, 97 L. Ed. 652, 73 S. Ct. 20; *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, aff. 334 U. S. 854, 92 L. Ed. 1776, 68 S. Ct. 1529; *Lawson v. United States*,

menaces the very existence of the government. It also necessarily appears, contrary to allegations of the complaint, that the purpose of the agreement was not to limit, or control, or direct the political activities of defendants' employees or to coerce them from following any course of political action or to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee. Nor was the investigation into the political beliefs of anyone. The allegations of the complaint in these respects are misleading and evasive. The word "political" implies "orderly conduct of [197] government, not revolution." (*Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485.)

App. D. C., 176 F. 2d 49, cert. den. 339 U. S. 934, 94 L. Ed. 1352, 70 S. Ct. 663; *United States v. Dennis*, 2 Cir., 183 F. 2d 201, 212-3, aff. 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857; *Barsky v. United States*, App. D. C., 167 F. 2d 241, 247, cert. den. 334 U. S. 843, 92 L. Ed. 1767, 68 S. Ct. 1511; *Daniman v. Board of Education*, 306 N. Y. 532, 540-1, 119 N. E. 2d 373, 379; *People v. Chambers*, 22 Cal. App. 2d 687, 709-13; 37 Georgetown L. J. 297. Said Judge Learned Hand in *United States v. Dennis, supra*, (183 F. 2d 212): "The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. That article, which is a common-place among initiates, is a part of the homiletics for novitiates, although, so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure. Our democracy, like any other, must meet that faith and that creed on the merits, or it will perish; and we must not flinch at the challenge."

The Case Against the Motion Picture Producers and Distributors

The complaint sounds in tort. To state a cause of action facts must be alleged showing that some legally protected interest of plaintiffs has been injured. (*MacLeod v. Fox West Coast T. Corp.*, 10 Cal. 2d 383, 386; *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 195.) The complaint does not allege any present or existing contract or employment of any one of plaintiffs. The cause of action attempted to be alleged is obviously one for wrongful interference with future or prospective contract or business relations. In effect it is alleged the motion picture producers and distributors combined and agreed to make it a condition of employment in the motion picture industry that the person shall not have been subpoenaed as a witness before the Committee and have refused on constitutional grounds to answer, not questions concerning hs political affiliations, activities, or beliefs, but whether he is or ever has been a member of the Communist Party, or that the person was named before the Committee as a Communist and had refused on constitutional grounds to appear before the Committee to answer questions concerning his Communist affiliations, beliefs, and associations. The specific injury of which plaintiffs complain is the loss or prevention of future or prospective employment in the motion picture industry. To state facts sufficient to constitute a cause of action for such loss or prevention of employment, it must be [198] averred that at the time of the alleged tort there was a certain or definite prospect that plaintiffs would obtain it.

The general rule is that before recovery can be had for interference with the loss of a future or prospective

contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into. (Cases collected 9 A. L. R. 2d 228, 256-7.) In *Campbell v. Rayburn*, 129 Cal. App. 2d 232, the complaint alleged: the plaintiff wrote a letter to the attorney general describing gambling activities in Riverside County; the attorney general advised the plaintiff that the letter had been forwarded to the defendant sheriff of Riverside County for attention and appropriate action; the defendant sheriff induced or otherwise caused two named gamblers who owned property in Palm Springs not to rent the plaintiff office space for the purpose of carrying on his business as a real estate broker; one of the named gamblers told the plaintiff he would not "give the plaintiff standing room"; and this same gambler had influenced his friends not to rent office space to the plaintiff, thus forcing him to conduct his business from his home. Demurrer was sustained without leave. Saying there was an attempt to state a cause of action for alleged wrongful interference with prospective contractual relations, the court on review held (p. 234):

> "[N]o facts are alleged with respect to whether such accommodations would otherwise have been available on terms satisfactory to the plaintiff, the availability or lack of accommodations other than those referred to, or facts showing that the plaintiff had any reasonable expectation of economic advantage which would otherwise have accrued to him, and no facts are alleged tending to show the nature or amount of any damage to the plaintiff.
>
> "The general principles applicable here have been applied in decisions in other states."

The court then quoted with approval from *Goldman v. Feinberg*, 130 Conn. 671, 37 A. 2d 355; *Union Car Ad-*

vertising Co. v. Collier, 263 N. Y. 386, 189 N. E. 463, and *Debnam v. Simonson*, 124 Md. 354, 92 A. 782. The judgment was affirmed.

In *Goldman v. Feinberg*, 130 Conn. 671, 37 A. 2d 355, quoted from in the Campbell case, one of the defendants requested the plaintiff, a real estate broker, to show him some houses which were for sale. The plaintiff did so over a period of 7 months but to no avail. Among the homes was one which the plaintiff saw on a public listing issued by a bank, [199] the list price for which was stated to be the irreducible minimum. At the defendant's request the plaintiff inquired of the bank if the price could be lowered and was told it could not. He did not inform the bank he was negotiating with the defendant. Later the bank sold the house to the defendant and paid the latter's father (also a defendant) a commission. The father had been present when the plaintiff showed the house to the son. The plaintiff's theory was that the defendants had conspired fraudulently to represent to the bank that the father was the procuring broker, thus depriving the plaintiff of a commission he would otherwise have been able to earn. The question as stated by the court was "whether the plaintiff, in order to make out a cause of action, must prove that he would have made a profit except for the unlawful interference with business relations is recognized not only in respect to existing contracts but also as to one's right to pursue his lawful occupation or business and concluded (37 A. 2d 356):

> "It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there

> has been actual damage suffered. Pollock, Torts, 14th Ed., p. 441; Winfield, Law of Tort, 2d Ed., p. 643; Prosser, Torts, p. 1016 *et seq.* To put the same thing in another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit. [Citations.] In Lewis v. Bloede, *supra,* the Circuit Court of Appeals says (202 Fed. at p. 17): 'When the parties have entered into a contract, the terms of which are fixed, the plaintiff is only required to show the malicious interference and the damage proximately resulting; whereas, if the ground of complaint is that he was about to make a contract, he is required to go further and show that he was not only "about to," but would, but for the malicious interference of the defendants, have entered into the contract.'"

In *Union Car Advertising Co. v. Collier,* 263 N. Y. 386, 189 N. E. 463, also quoted from in the Campbell case, the plaintiff was one of two bidders on a proposal to lease advertising space in the cars and platforms of an elevated railway. The [200] plaintiff's bid offered the higher rental of the two. The negotiations with the lower bidder and proceeded to a point which made it likely, if not certain, that the plaintiff would get the contract on which it was bidding. The railway company awarded the contract to the defendants after changes in terms, on which the plaintiff had not been given an opportunity to make a proposal. The plaintiff's contention was that the result came about from the defendants' wrongful interference. The interference consisted of misrepresentations as to the plaintiff's business ability and

financial integrity; the bringing of political and economic pressure on the railway's trustees; and the defendants' indemnification of the railway from loss resulting from lawsuits arising out of rejection of the plaintiff's bid. The jury was instructed that the plaintiff could recover if the defendants' acts had prevented the railway company "from entering with him into a contract which it is reasonably certain would have been made but for such interference." The judgment was for the plaintiff. Reversing, the Court of Appeals said (189 N. E. 469):

> "[Referring to the quoted instruction] If these words mean anything less than 'would have received,' we think they go too far. A cause of action exists where an executed contract is broken by a third person's unlawful interference. [Citation.] A cause of action has also been recognized where a party *would* have received a contract but for the malicious, fraudulent, and deceitful acts of a third party, such, for instance, as materially lying about him. [Citations.] There must be some certainty that the plaintiff would have gotten the contract but for the fraud. This cannot be left to surmise or speculation. The courts rightfully extended the arm of the law to reach one who deliberately interfered with an executed contract [citation], since which time they have gone a step further and mulcted in damages him who does the same thing to one who *would* have received such a contract but for the illegal interference. [Citations.] The courts will be a little slow in permitting juries to speculate upon what a competitor had reason to expect or might reasonably suppose would happen. The expressions 'reasonable expectation' or 'reasonably certain' may not be as precise as '*would* have received,' and we think the latter words are preferable."

In *Debnam v. Simonson,* 124 Md. 354, 92 A. 782, also quoted from in the Campbell case and cited with approval in *Imperial Ice Co. v. Rossier,* 18 Cal. 2d 33, 36, the plaintiff devised a plan to buy certain land and build an apartment building thereon. He disclosed his project [201] in confidence to one of the defendants who was an architect and entered into a contract with the latter to prepare the plans and specifications. He also entered into contracts for labor, materials, and financing, and was about to enter into a contract for the land. At that time the defendants, conspiring together, acquired the land for themselves, thus preventing the plaintiff from consumating his proposed purchase and also preventing his performance of the other contracts into which he had entered. A demurrer to the complaint was sustained. The Maryland Court of Appeals held (92 A. 783):

> "The mere fact that the plaintiff has suffered damage or has lost an opportunity to profit financially because of his failure to consummate his plans owing to the purchase of said lot of land by the defendants does not in itself give him the right of recovery from the defendants for the damage sustained by him. The act must be of such a character as to create an actionable wrong before the right of recovery against the defendants exists, and, to create an actionable wrong, the legal rights of the plaintiff must in some way be invaded. There must be a violation of a legal right committed knowingly to create a cause of action. . . .
>
> "[92 A. 784.] [T]his declaration is also defective because it does not allege with sufficient clearness, if at all, that, but for the alleged interference of the defendants, the plaintiff would have become the purchaser of the property, and would have suc-

ceeded in consummating his alleged contemplated plans or project. Such an allegation is necessary. Before he can recover it must be shown that, but for that interference, the purchase would have been made and his plans consummated."[7]

The complaint in the case at bar is devoid of any allegation of fact that any contract or relationship would have been entered into between any one of plaintiffs and any one of defendant motion picture producers and distributors or with anyone in the motion picture industry but for the alleged agreement. There is no factual showing of denial of employment. There is no allegation that at the time the agreement was made, or at any time, thereafter, any one of plaintiffs was an employee of any one of the defendants or had any reasonable prospect of becoming such; or that any one of them was, or is, or had any prospect of being a producer of motion pictures. There is not even an allegation that there were any negotiations pending or in progress between any one of plaintiffs and any one of defendants or with anyone in the industry, or that any plaintiff was seeking employment in the industry at the time of the alleged tortious interference. There is no allegation that at any time after the making of the agreement any one of plaintiffs requested employment from any one of defendants or from anyone in the motion picture industry. It is not alleged that, but for defendants' alleged interference any one of plaintiffs would, or even probably or possibly would, have

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[7]And see *Hundley v. Louisville & N. R. Co.*, 105 Ky. 162, 48 S. W. 429, 431, 63 L. R. A. 289, 88 A. S. R. 298; *Bailey v. Hans Watts Realty Co.*, 113 W. Va. 739, 169 S. E. 404; *Celli & Del Papa v. Galveston Brewing Co.*, (Tex.) 227 S. W. 941, 943; *Payne v. Gebhard*, (Tex. Civ. App.) 136 S. W. 1118, 1120; *Harnick v. Avrum Realty Corp.*, 248 App. Div. 385, 288 N. Y. S. 256.

been employed in the industry. At the oral argument counsel for plaintiffs conceded it was not alleged "that individual plaintiffs did apply for work and were denied the right to work."

So far as appears, the last efforts of plaintiffs to obtain employment may have occurred years before the agreement. All that is alleged is that at some unspecified time prior to the agreement, they had been so employed. When and why that employment was terminated is not alleged. Since the employment terminated some time before the agreement, in the absence of contrary allegation the inference necessarily is that the termination was the result of facts wholly disconnected from the agreement and that those facts, whatever they may have been, still are effective. It cannot be inferred from the alleged facts that at some unspecified time prior to the agreement plaintiffs were employed in the motion picture industry, they have not obtained employment since they invoked their constitutional privilege solely because of that fact.

There is an entire absence of factual allegation showing that any legally protected interest of plaintiffs has been interfered with. Neither an existing nor a prospective contract or business relationship is alleged. And there is nothing in the pleading from which it may be inferred that any prospective contract or business relationship has been interfered with by any wrongful act of defendants. The most that is alleged is a hope or expectation of em-

ployment. The complaint does not state facts sufficient to constitute a cause of action.

Bigelow v. RKO Radio Pictures, 327 U. S. 251, 90 L. Ed. 652, 66 S. Ct. 574, and *Speegle v. Board of Fire Underwriters,* 29 Cal. 2d 34, cited by plaintiffs, are not apposite. In Bigelow, a suit for an injunction and damages for violation of the Sherman and Clayton Acts, the sole ques [203] tion was, as stated by the court, "whether the evidence of damage [was] sufficient to support the verdict" for plaintiff. In Speegle the complaint alleged interference with existing contracts.

Plaintiffs argue they should have been permitted to amend. One of the grounds of defendants' demurrer to the original complaint was that no cause of action was stated because of the absence of any allegation to the effect that an existing or prospective contract or business relationship had been interfered with.[8] The demurrer

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[8]In points and authorities filed in support of their demurrer to the original complaint, defendants said: "The complaint does not state facts sufficient to constitute a cause of action for interference with business relations. No existing contract between plaintiffs and any of the defendants is alleged. Consequently, there must be shown a reasonable probability that, but for the alleged interference, business relations between the parties would have been entered into. It is not enough that plaintiffs hoped or even expected that such relations might eventuate, the fact that they would have eventuated must appear.

"Before recovery can be had for interference with and loss of a prospective business relationship or contract, it is held that 'it must appear that such relationship or contract would otherwise have been entered into.'

"*Annotation,* 9 A. L. R. 2d 256-257, and cases there cited."

was sustained with leave. Plaintiffs then filed the complaint now before us. Plaintiffs amended only perfunctorily. For all practical purposes the original and the amended complaint are identical. No curative effort at all was exerted though opportunity was given. We must assume that plaintiffs have stated their cases as strongly as it was possible for them to do. (*Faulkner v. Cal. Toll Bridge Authority*, 40 Cal. 2d 317, 328.) Having declined to avail themselves of leave to amend in the particular which defendants specifically pointed out to them, plaintiffs must "stand upon their pleading as against all grounds and if the complaint is objectionable upon any ground the judgment of dismissal must be affirmed. [Citations.] Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him." (*Metzenbaum v. Metzenbaum*, 86 Cal. App. 2d 750, 752.) Plaintiffs evidenced their satisfaction with the pleading and their willingness to stand or fall on it in its present form. The court did not err in sustaining the demurrer of the motion picture producers and distributors without leave to amend. [204]

In view of our conclusion, we do not reach other points argued by counsel.

The Case Against the Members of the Committee and the Investigator

The demurrers of these defendants were sustained with leave to amend. Plaintiffs declined to amend. As the complaint stands, it alleges these defendants entered into the agreement. For the reasons stated in considering the complaint as against the other defendants, it does not state facts sufficient to constitute a cause of action against the members of the Committee or the investigator. The complaint avers that with respect to all matters alleged these defendants "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities." These defendants argue they cannot be sued for the same acts both in their official capacities and in their personal capacities. In view of what we have said it is unnecessary to decide the point.[9]

The judgments are affirmed. [205]

VALLÉE, *J.*

We Concur.

SHINN, *P. J.*

WOOD, *J.*

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[9]See *Laughlin v. Rosenman*, App. D. C., 163 F. 2d 838, 843; *Cooper v. O'Connor*, App. D. C., 107 F. 2d 207, 210; *Reed v. Molony*, 38 Cal. App. 2d 405, 411; 67 C. J. S. 417, Sec. 125.

APPENDIX B.

Opinion of the Superior Court.

In the Superior Court of the State of California in and for the County of Los Angeles.

Michael Wilson, *et al.*, Plaintiffs, vs. Loew's Incorporated, *et al.*, Defendants. No. 610835.

MEMORANDUM RULINGS

This cause requires consideration of an alleged agreement not to employ plaintiffs in the motion picture industry, an alleged inducement of that agreement, the nature of the privilege to refuse to answer questions on the ground of self-incrimination and alleged refusals, on that ground, to appear before a congressional committee.

The amended complaint principally differs from the original, to which demurrers were sustained, in that the words "conspiracy" and "blacklisting" have been eliminated and the word "maliciously" has been added. Forty-one of the forty-four pages are the same mimeographed pages with here and there the above words penciled out.

In considering the several questions it will be convenient to divide the plaintiffs into two classes, those, eighteen in number, who appeared before the committee on un-American activities of the United States House of Representatives and refused to answer "certain questions" as to their activities and affiliations on the ground that the answers would tend to incriminate themselves and those, five in number, as to whom it is alleged they had been named as communists by previous witnesses and refused to appear before the committee upon the ground of self-incrimination. Likewise, it will be convenient to consider the defendants in two groups, those who are alleged to

be motion picture producers and distributors and the three, two of whom are members of and the third an investigator for the congressional committee.

The plaintiffs have not alleged the existence of any contract with any defendant or third person or attempted any conventional allegations of restraint of trade. The cause of action attempted on behalf of each plaintiff has been based upon an agreement, and the inducement thereof, to refuse employment in the motion picture industry to all persons who: (1) are subpoenaed as witnesses before said un-American activities committee and refuse to answer questions as to their affiliations, associations and beliefs upon the ground that their answers would incriminate themselves, or (2) are so subpoenaed and fail or refuse to appear.

The first question which will be considered is whether the amended complaint states facts sufficient to constitute a cause of action for damages or an injunction against the larger class of defendants, those who are alleged to be motion picture producers and distributors.

The gist of the causes of action attempted against these defendants is not found in any California statute or judicial decision. Its genesis would appear to be section 765 of the Restatement of Torts: "(1) Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances."

The above section, apparently, has not been referred to in any judicial decision in this or any other state although there are decisions which approach the field.

Consideration has led to the acceptance of the proposed rule although there are cogent arguments which might be presented against its acceptance.

The tort described in the section does not consist alone of the agreement not to enter into business relations, the proposed rule is that liability exists "if their concerted refusal is not justified under the circumstances." Lack of justification is a part of the tort, not merely a matter of defense. This conclusion rests upon three separate premises: (1) The statement of the rule itself, (2) the fact that it is an exception to the broader rule of non-liability stated in section 762 of the restatement and (3) by analogy to the holding in *Speegle v. Board of Fire Underwriters*, 29 Cal (2) 34.

In the Speegle case, decided on demurrer, the alleged tort was of greater degree, interference with existing contractual relationships, but the following language (pp. 40-41) is pertinent: "Collective bargaining . . . is carried on in recognition of the fact that employers as well as employees may organize for the purpose of furthering their common interests and that such organizations may bring pressure upon their members to include in their contracts certain terms and conditions or to terminate contracts that do not contain such terms and conditions . . . . Defendants' activities would be for an unlawful purpose, however, and would not be justified, if their objective was to stifle competition by enforcing a scheme to restrain trade (Rest. Torts, sec. 768 (c).) The answer to the question whether defendants are liable for interference with plaintiff's contractual relations therefore depends upon whether plaintiff has stated a good cause of action against defendants for injury to his business by activities in restraint of trade. Has plaintiff

properly raised in his pleadings the question of defendants' liability for restraint of trade?"

In the present case the question is, have plaintiffs properly raised in their pleadings the question of defendants' liability for a concerted refusal without justification under the circumstances?

The answer requires a consideration of the privilege to refuse self-incrimination, the scope of the fifth amendment to the Constitution and the privilege as embodied in the California constitution and laws.

The history of the privilege to refuse to answer a question on the ground that the answer would tend to incriminate the witness has been set forth in *Twining v. New Jersey*, 211 U. S. 78; 53 L. Ed. 97 and in greater detail in Wigmore on Evidence, section 2251. Briefly, it may be stated that it was unknown at the time of Magna Carta; it was not mentioned in the Petition of Rights (1629), the Bill of Rights (1689), by our Continental Congress or in the original draft of the Constitution. It developed as a rule of evidence in the English law courts during a period of their conflict with the ecclesiastical courts, wherein the privilege was unknown. It is not improbable that its origin was influenced by those jurisdictional rivalries, for it was not an age marked by concern for those charged with crime or called as witnesses. (Later writers base it upon the morality of the judicial process.) The English bankruptcy courts have not granted it to a bankrupt even if criminal charges were pending against him. It is peculiar to the British Isles and those countries which have taken the common law thence. It was incorporated in some early American state constitutions and into the fifth amendment to the

Constitution on the insistence of only four of the original thirteen states.

Exemption from self-incrimination is not a part of due process of law or a privilege or immunity of national citizenship. In the leading case of *Twining v. New Jersey, supra,* it was held: "Even if the historical meaning of due process and the decisions of this court did not exclude it, it would be going far to rate it as an immutable possession of every citizen of a free government. . . . The wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it today and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient."

As recently as *Adamson v. California,* 332 U. S. 46, 91 L. Ed. 1903, it was held (p. 53):

> "We reaffirm the conclusion of the Twining and Palko cases that protection against self-incrimination is not a privilege or immunity of national citizenship." (*cf. Louisiana v. Resweber,* 329 U. S. 459; *Brock v. North Carolina,* 344 U. S. 324.)

It has frequently been contended, in the above and other cases, that some state action or authorized procedure impaired the protection against self-incrimination afforded by the fifth amendment to the Constitution. The Supreme Court of the United States has consistently held that said fifth amendment is "restrictive only of national action". It has held that the states are free to grant or withhold the privilege against self-incrimination (*cf.* concurring opinion of Mr. Justice Frankfurter in *Louisiana v. Resweber, supra*), that they might adopt the civil law (*Holden v. Harby,* 169 U. S. 387; *Maxwell v. Dow,*

176 U. S. 581) wherein self-incrimination is compelled (*Twining v. New Jersey, supra*).

It is necessary therefore to turn to the law of California to measure the right asserted by the plaintiffs herein, for the fifth amendment extended no farther than to prevent the congressional committee from compelling plaintiffs to answer questions if the answers tended to incriminate plaintiffs. It is necessary to turn to the law of California to evaluate plaintiffs' rights for another reason. Plaintiffs contend that the alleged agreement among these defendants prevents plaintiffs from pursuing their several callings in the motion picture industry. Ever since the Slaughterhouse cases (16 Wall 36; 21 L. Ed. 394) it has been held that the right to engage in a trade, business or calling is not a privilege or immunity of national citizenship, but of state citizenship (*Twining v. New Jersey, supra*).

The privilege afforded by California relative to self-incrimination is to be found in the following words of section thirteen of article one of our constitution: "No person shall . . . be compelled, in any criminal case, to be a witness against himself; but in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury . . ."

The first portion of the above quotation antedates 1934, at which time the second portion was adopted. Prior to 1934 it had been settled that the words "in any criminal case" were not limited to their ordinary meaning, but also included civil actions, grand jury and legis-

lative committee hearings. The use of identical words in the 1934 amendment must be given the same interpretation. The privilege granted and its burden are co-extensive.

In a California criminal prosecution the defendant's failure to deny or explain by his testimony evidence or facts against him leads to the result "that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable" (*People v. Adamson*, 37 Cal. 2d 478; aff. 332 U. S. 46).

No reason occurs why comment and consideration by counsel, court and jury should be permissible in the forum of criminal prosecutions, but a concert of conduct in the forum of business enjoined. If the court or jury may draw unfavorable inferences in a criminal prosecution, no reason occurs why those who merely are possible employers should be required to respond in damages for conduct to protect their business interests from the result of such inferences being drawn by their customers.

The authors of section 765 themselves state in their discussion of section 762 the necessity that each business enterprise must be free to select its own relations in its own interests, a part of the liberty of every person to acquire property, engage in business and select which business transactions he shall enter. Section 765 they propose as an exception to the rule of non-liability, as a limitation upon the foregoing freedom, in so far as the concert of refusal affects the economic welfare.

The economic welfare does not require enjoining possible employers from agreeing among themselves that they will not employ persons who refuse to answer ques-

tions as to their activities, affiliations and associations in the course of investigations relative to communistic activities in this country. Nor was the privilege against self-incrimination originated or continued for the protection of the economic interests of those who exercise it. No witness may refuse to answer a question because it will affect his economic interests adversely. The exemption is available only if the answer will tend to show conduct for which the witness may be prosecuted and convicted (*cf. Ex parte* Cohn, 104 Cal. 524).

Another standard of evaluation in determining whether the agreement alleged to have been made by defendants was not justified under the circumstances is to be found in previous rulings in this court that complaints for the termination of school teachers who similarly refused to answer questions, notwithstanding school district rules requiring answers and authorizing termination proceedings for refusals, stated facts sufficient to constitute causes of action.

Further, it should be noted that section 1028.1 of the Government Code makes it the duty of every public employee to appear before any committee or sub-committee of the Congress or state legislature in this field and answer questions. The section further provides: "Any public employee who fails or refuses to appear or to answer under oath on any ground whatsoever any questions so propounded . . . . shall be suspended and dismissed from his employment in the manner provided by law." The section appears to be a valid legislative enactment.*

Plaintiffs are not concerned with possible employment in the public service, but it would be an anomalous result

if public employees were discharged for certain conduct and those not in public service could enjoin or recover damages from non-employers because the latter mutually agreed to refrain from employing persons who so acted. It would be strange law which found service of the public interest in the former instance, but an anathema in the latter merely because of the concert of action.

The foregoing considerations point toward a ruling that, as a matter of law, the agreement alleged was justified under the circumstances, but it is not necessary to go that far. It is necessary, as stated at the outset, that plaintiffs plead facts sufficient to show that the concert of agreement was not justified under the circumstances.

Plaintiffs have recognized that necessity, for in the complaint and amended complaint they have alleged purposes behind the said agreement. Paragraph seven of the amended complaint contains those allegations. The purposes alleged were to limit, control and direct plaintiffs' political activities; to coerce and influence them to refrain from adopting or following any course or line of political action or activity not acceptable to the committee on un-American activities, to limit employment of persons to those whose political beliefs are acceptable to said committee and the content of motion pictures to that which is acceptable to said committee. These allegations appear more inciting than substantial, more of a cliché than factual, and while considerable liberality should be allowed the pleader in stating facts by way of lack of justification "under the circumstances", it does not follow that any statement will suffice because it has been made. If the goal alleged cannot result, the allegation of purpose will not suffice.

The amended complaint alleged that defendants agreed to exclude from employment: (1) communists, (2) those who refused to appear and (3) those who declined to answer questions as to their activities, affiliations, associations and beliefs. These plaintiffs have not alleged that they are communists, they have alleged they appeared, hence the only allegations as to the agreement affecting them is the failure to answer. Merely giving answers as to activities, affiliations, associations or beliefs, past or then current, would not have limited, controlled or directed their political activities. Whatever their past conduct or beliefs, these could not be changed, limited, controlled or directed retroactively. Whatever their then current activities, associations or affiliations these could not then have been changed or directed by anyone except plaintiffs. Their activities could have been controlled and limited only if criminal and the law actually seeks to control and limit criminal activity, political or non-political. The allegations as to beliefs and influencing may be dropped from consideration. The holding of a belief cannot be externally controlled, directed or limited and could not in itself constitute a crime. Belief held, without overt acts, might be immaterial in an inquiry but it would not be within the privilege against self-incrimination. As to influencing plaintiffs' political activities, affiliations and associations the law does not look askance at such efforts and the concerted actions of political parties, clubs and candidates are devoted to that end.

How employment in the industry would be limited to those acceptable to the committee if plaintiffs had answered does not appear. To the attainment of that result we should have to presume further terms into the agree-

ment alleged and read into the amended complaint facts which have not been alleged.

The alleged purpose of limiting the content of motion pictures to matter acceptable to the committee cannot stand up under scrutiny. The amended complaint alleges these defendants controlled the industry, presumably plaintiffs did not, therefore the content of pictures would appear to have been determined by defendants prior, during and subsequent to the committee hearings and could not have been affected if plaintiffs had answered. Further, motion pictures are a product of private industry and the law is not concerned with whether the producers thereof desire to exclude content which is not acceptable to some race, creed or committee.

The amended complaint, as did the original, fails to allege unjustness under the circumstances.

When we turn to the second group of plaintiffs (counts 16, 19, 20, 21 and 22) we find certain additional allegations and the absence of one. The added allegations are that the particular plaintiff in each count had been named as a communist by previous witnesses before the committee and had refused to appear before the committee. The allegation missing is that the plaintiff had been subpoenaed to appear. In other words, each of the eighteen counts on behalf of plaintiffs who appeared alleges that the particular plaintiff was subpoenaed although the appearance renders the allegation surplusage, but these five counts are silent as to subpoenas. It is not unreasonable to assume that any absence of or defects in subpoenas would have been alleged in the amended complaint, if not the original. If plaintiffs had not been subpoenaed, they could not state causes of action founded

on the agreement, for it, as alleged, applies only to persons who appear or are subpoenaed and fail to appear.

The refusal or failure to appear is not an exercise of the privilege against self-incrimination, for that exemption has never given the witness the right to elect between appearance or non-appearance. The conduct of these defendants was not authorized by the fifth amendment to the Constitution or the laws of California.

The rule proposed in section 765 of the restatement rests upon an assumed economic value, namely, that while individuals may refuse to have business relations there may be instances in which a concert of refusal will not be tolerated because of the greater force and economic power of the concert of action. Mere concert of action is not condemned, because the law recognizes and upholds concerted effort in collective bargaining and other relationships.

No reason appears why refusals to appear before courts or legislative committees should be encouraged. No reason appears why the economic welfare requires that notwithstanding contemptuous conduct toward a summons from a governmental agency the concert of action of exclusion is a thing which must be enjoined or penalized by an award of damages. The prospect of contempt proceedings, not an award of damages or an injunction must remain the wages of such conduct.

As to each of these five plaintiffs the amended complaint alleges: "plaintiff . . . . was named as a Communist by a witness appearing before the said Committee on Un-American Activities . . ." The defendants herein and the public would be entitled to draw from the refusal to deny or explain this evidence, inferences which

were unfavorable. It would be unrealistic to say that the defendant employers who are dependent upon the public for the continuance of their businesses would not be "justified under the circumstances" in making an agreement not to employ this group of plaintiffs. Their economic interest is self-evident and not to be gainsaid by academic discussions.

This brings us to the second group of defendants, three in number, two of whom are members of the congressional committee and one an investigator for the committee.

Because the amended complaint is merely forty-one mimeographed pages found in the original with certain words pencilled out and three partially new pages, it actually alleges that these defendants entered into an agreement not to employ plaintiffs, allegations which plaintiffs probably did not intend. It is more probable that plaintiffs desire to stand on the allegations that these defendants induced the others to make the agreement.

No demurrer for failure to separately state causes of action was filed by these defendants only a general demurrer to the entire amended complaint.

The court must take cognizance of the probability of an absence of any economic interest in these defendants and consider the allegations to be of a purposeful interference by strangers with the possibility of business relationships.

Purposely causing another not to enter into business relationships with a third person has been recognized as a possible tort from very early times and in many varied situations. Such a tort was recognized as early

as the year 1410 and the common law developed a special writ in the field before the end of that century.

The earliest decisions were in cases which involved some violence, threat thereof, fraud or defamation, but the general doctrine has been broadened time and again to situations which do not contain these elements. Within the general field are trademark and trade name infringements, fraudulent misrepresentations, defamation of business and disparagement of goods.

Essential elements are the nature of the acts which constitute the inducement, for not every inducement rests upon tortious conduct; knowledge upon the part of the actor, for an inducement may be without knowledge and not tortious and the relationship of the parties, because that may authorize the conduct of the defendant. In other words, merely alleging that the defendants "induced" others not to enter into business relationships with the plaintiffs does not allege (1) tortious conduct, or (2) any act on the part of the defendants charged. Such allegation is a legal conclusion of the pleader. It gives the result of action, but fails to allege what was done. It is as descriptive of acts for which no liability attaches as it is of tortious conduct. The facts from which the pleader concludes that the defendant induced the refusal to enter into business relations may or may not warrant the recovery of damages. It may have been completed leaving nothing to enjoin or it may be continuing. The situation cannot be determined either way as a matter of law and plaintiffs should be given another opportunity to amend.

The twenty-three general demurrers (one to each count of the amended complaint) of each of the following de-

fendants, Loew's Incorporated, Paramount Pictures, Inc., Columbia Pictures Corporation, R.K.O. Radio Pictures, Inc., Warner Brothers Pictures, Inc., Republic Productions, Inc., Hal E. Roach Studios, Inc., T.C.F. Film Corporation, Universal Pictures Company, Inc., Warner Bros. Pictures Distributing Corporation, United States Pictures, Inc., Sol Lesser Productions, Inc., Association of Motion Picture Producers, Inc., E. B. Mannix, Dore Schary, Harry M. Warner and Jack Warner are sustained without leave to amend.

The general demurrers of the defendants Donald L. Jackson, Clyde Doyle and William Wheeler to the amended complaint are sustained with thirty days to amend.

DATED: July 9, 1954.

Ellsworth Meyer
Judge

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*Since the preparation of the foregoing opinion, it has been reported that the District Court of Appeal, Third District, has upheld the constitutionality of section 1028.1, Government Code, (Steinmetz v. ————) but the opinion, if written, is not at hand.

APPENDIX C.

Order of Supreme Court of State of California After Judgment by District Court of Appeal.

Order denying hearing after judgment by District Court of Appeal. 2nd District, Division 3, Civ. No. 20769, Civ. No. 21100.

In the Supreme Court of the State of California in Bank.

Wilson, *et al.*, Appellants, v. Loews Incorporated, *et al.*, Defendants; Association of Motion Picture Producers, Inc., *et al.*, Respondents.

Wilson, *et al.*, Appellants, v. Loew's Incorporated, *et al.*, Defendants; Doyle, *et al.*, Respondents.

Appellants' petition for hearing DENIED.

Carter, J. is of the opinion that the petition should be granted.

Gibson, *Chief Justice.*

Filed Aug. 8, 1956. William I. Sullivan, Clerk. By S. F. Deputy.

William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 12th day of Sept. A. D. 1956.

William I. Sullivan, By Crabtree, Deputy Clerk.
[Seal]

APPENDIX D.

Constitutional Provisions and Statutes Involved.

The pertinent provision of the Fourteenth Amendment reads as follows:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provision of the Fifth Amendment reads as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

The pertinent provisions of Article VI of the Constitution read as follows:

> ". . . This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

* * * * * * * *

The pertinent provisions of the following statutes involved read as follows:

18 U. S. C. 241, June 25, 1948, C. 645, 62 Stat. 696.

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> . . .
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

* * * * * * * *

The pertinent provisions of 50 U. S. C. 783(f), Sept. 23, 1950, C. 1024, Title I, Section 4(f), 64 Stat. 991 are:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . . ."

* * * * * * * *

2 U. S. C. 192, as amended June 22, 1938, C. 594, 52 Stat. 942 reads:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any Committee of either House of Congress, willfully makes default or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

* * * * * * * *